February 22, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Marilyn K. Lingle

Date of Filing: January 15, 2008

Case Number: TFA-0242

On January 15, 2008, Marilyn K. Lingle filed an Appeal from a final determination issued to her by the Department of Energy's (DOE) Oak Ridge Operations Office (Oak Ridge). In that determination, Oak Ridge withheld documents in response to a request for information that Ms. Lingle filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require Oak Ridge to release the withheld information.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

By e-mail dated June 29, 2007, Ms. Lingle submitted a FOIA request to Oak Ridge seeking: (1) documents located within a Bechtel Jacobs Company (BJC) dosimetry records book indicating that a request for a bioassay sample was issued to herself and a co-worker (on or about the week ending June 4, 2005) and (2) any documents pertaining to the reason for her co-worker's termination from DOE.[1] *See* E-mail from Marilyn Lingle to Oak Ridge (June 29, 2007) (FOIA Request).

[1] In her FOIA Request, Ms. Lingle mentions that the Safety and Ecology Corporation (SEC), a sub-contractor of BJC, was given a "Red Letter" from BJC stating that she was not qualified in her new assignment as an Industrial Hygiene Technician in December 2005. *See* FOIA Request. In her Appeal, Ms. Lingle asserts that she did not receive a copy of the Red Letter, nor did she receive an explanation in the Determination Letter as to why this information was not included. *See* Appeal Letter.

Oak Ridge conducted a search of its records for responsive documents. Oak Ridge located and released a set of bioassay log sheets and similar files with deletions of the names and badge numbers of other individuals pursuant to 5 U.S.C. § 552(b)(6) (Exemption 6). *See* Letter from Amy Rothrock, Oak Ridge, to Marilyn Lingle (December 18, 2007) (Determination Letter).

On January 15, 2008, Ms. Lingle filed this Appeal[2] challenging Oak Ridge's decision to withhold information pursuant to Exemption 6. *See* Letter from Marilyn K. Lingle to OHA (received January 15, 2008) (Appeal Letter). In her Appeal, Ms. Lingle disputes the position taken by Oak Ridge that the release of names and identifiers of other employees when connected with their personal exposure data and other vital statistics is a serious invasion of privacy of those individuals and is not in the public interest. *Id.* Ms. Lingle argues that, "It is general knowledge that employees performing work in any radiologically controlled environment are on a bio-assay program… [and] the fact that an employee is…asked to submit to a sample should not be considered a serious invasion of privacy…" Ms. Lingle asserts that she requested the one-page computer-generated print-out that states the names of individuals who were required to submit to a bioassay in the specified time frame, not the set of bioassay log sheets that were released.[3] *Id*. Ms. Lingle continues that she "is not requesting the results of the bioassay" and maintains that "the information [she is] requesting is in no way connected with the personal exposure data of the named individuals." *Id.*

II. Analysis

A. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

In reviewing this matter, we contacted Oak Ridge and learned that it did not construe the mere mention of the Red Letter as a request for that document, but rather as information provided in support of her other requests for information. *See* Memorandum of Telephone Conversation between Amy Rothrock, Oak Ridge, and Avery Webster, OHA (dated February 19, 2008). Therefore, Oak Ridge did not perform a search for the Red Letter. Ms. Lingle may consider filing a new FOIA Request with Oak Ridge for the document.

[2] Ms. Lingle is not contesting the adequacy of search as it relates to item two of her FOIA Request. *See* Appeal Letter.

[3] With regard to the one-page computer-generated document that Ms. Lingle requested, Oak Ridge conducted a search of all agency records pertaining to DOE and BJC contractor oversight of the dosimetry monitoring program for projects under the control of BJC. *See* Electronic Mail Message from Amy Rothrock, Oak Ridge, to Avery Webster, OHA, dated January 25, 2008 (January 25, 2008 Email). The search produced 79 pages of various types of radiation control operational and health physics department documents, including Ms. Lingle's personnel radiation exposure record file (DOE-33). *See* Electronic Mail Message from Amy Rothrock, Oak Ridge, to Avery Webster, OHA, dated January 18, 2008. Oak Ridge provided Ms. Lingle with all 79 pages of information it located in its search. *See* January 25, 2008 Email. Based on the results of the search, Oak Ridge concluded that no one-page computer-generated document from June 2005 containing Ms. Lingle's name and that of her co-workers asked to submit to a bioassay exists. *Id*.

5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the information would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *FLRA v. Dep't of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the information would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-770. *See Sowell, Todd, Lafitte, Beard and Watson LLC*, 27 DOE ¶ 80,226 (August 31, 1999) (Case No. VFA-0510); *Frank E. Isbill*, 27 DOE ¶ 80,215 (July 7, 1999) (Case No. VFA-0499).[4]

1. The Privacy Interest

Oak Ridge determined that the release of names and identifiers of other employees when connected with their personal exposure data and other vital statistics is a serious invasion of privacy. In her Appeal, Ms. Lingle argues that it is general knowledge that employees who perform work in any radiologically-controlled environment are on a bioassay program, and therefore, the fact that an employee is asked to submit to a sample is not considered a serious invasion of privacy.

BJC is the environmental management contractor for the DOE's Oak Ridge Office. Employees of BJC are contractor employees, not federal government employees, whose names, job titles, work stations and salaries must be released under the FOIA (see 5 C.F.R. § 293.311). Thus, BJC employees have a reasonable expectation of privacy concerning their identity.

We agree with Oak Ridge that a substantial privacy interest exists in the identity of the contractor employee. *See Citizen Action New Mexico*, 29 DOE ¶ 80,311 (October 19, 2007) (Case No. TFA-0224). The courts have also reached this conclusion. *See Painting and Drywall Work Preservation Fund v. HUD*, 936 F.2d 1300 (D.C. Cir. 1991) (the release of contractor employees' names and addresses would constitute a substantial invasion of privacy). Applying these standards to the facts of this case, we believe that the release of the individual's names and other identifiers (i.e. corresponding badge numbers) would reveal personal information or records about the individual. Therefore, we find that there is a substantial privacy interest in the identity of contractor employees.

[4] OHA decisions issued after November 19, 1996 may be accessed at http://www.oha.doe.gov/foia1.asp.

2. The Public Interest

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure of the information. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773; *see Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (August 5, 1996) (Case No. VFA-0184). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Dep't of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)).

In determining whether any public interest is served by a requested disclosure, an agency should not consider "the purposes for which the request for information is made." *Reporters Committee*, 489 U.S. at 771. The Court held that rather than turn on a requester's particular purpose, circumstances, or proposed use, such determinations must turn on the nature of the requested document and the relationship to the basic purpose of the FOIA. *Id.* at 772. Furthermore, the Court delimited the scope of the public interest to be considered under the FOIA's privacy exemptions to include the "core purpose of the FOIA" or "the kind of public interest for which Congress enacted the FOIA." *Id.*

We find that there is a minimal public interest, if any, in release of the withheld information. Ms. Lingle has not demonstrated how the disclosure of the names and badge numbers of the non-federal employees will reveal anything of importance regarding the DOE or how it would serve the public interest. At best, Ms. Lingle has articulated a personal interest in obtaining the withheld information. Further, revealing the names of private citizens will not contribute significantly to the public's understanding of government activities. Accordingly, we agree with Oak Ridge and find that there is a minimal public interest in the disclosure of the names and badge numbers withheld pursuant to Exemption 6.

3. The Balancing Test

In determining whether information may be withheld pursuant to Exemption 6, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762; *SafeCard Service v. SEC*, 426 F.2d 1197 (D.C. Cir. 1991). We have concluded that there is a significant privacy interest at stake in this case. Moreover, we found that there is only a minimal public interest in the release of the names and badge numbers of the contractor employees.

It is Ms. Lingle's contention that no privacy interest exists where an employee is asked to submit to a bioassay sample, simply because it is general knowledge that employees who perform work in radiologically-controlled environments participate in bioassay programs. We disagree. The fact that an event or occurrence is not wholly private does not mean that the individual has no interest in limiting disclosure or dissemination of the information. *See Reporters Committee*, 489 U.S. at 770. Further, the fact that certain employees are asked to submit to a bioassay program is not, in itself, the kind of public interest for which Congress enacted the FOIA. Therefore, we find that the public interest in disclosure of the names and badge numbers

withheld pursuant to Exemption 6 is outweighed by the real and identifiable privacy interest of the named individuals.

III. Conclusion

Based on the foregoing information, we find that Oak Ridge properly withheld the names and badge numbers of the individuals pursuant to Exemption 6 of the FOIA. Therefore, the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Marilyn K. Lingle on January 15, 2008, Case No. TFA-0242, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 22, 2008